Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-235

PITTSBURGH & NEW ENGLAND TRUCKING CO.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,

Respondents,

COLONIAL FAST FREIGHT LINES, INC.,
COLONIAL REFRIGERATED TRANSPORTATION, INC.,
and
YOURGA TRUCKING, INC.,

Intervenors in Support of Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Colonial Fast Freight Lines, Inc., Colonial Refrigerated Transportation, Inc., and Yourga Trucking, Inc., hereinafter referred to as Intervenors, hereby register their opposition to, and urge the denial of, the petition for a writ

of certiorari to the United States Court of Appeals for the Third Circuit filed by Pittsburgh & New England Trucking Co., hereinafter referred to as Petitioner.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an order on May 3, 1978, dismissing the Petition for Review of Pittsburgh & New England Trucking Co. in No. 76-2617, *Pittsburgh & New England Trucking Co. v. United States,* on the ground of the failure (of Petitioner) to exhaust administrative remedies.

The Interstate Commerce Commission never rendered an opinion in this case subsequent to the remand of the case by the United States Court of Appeals for the Third Circuit in No. 75-2170, *Pittsburgh & New England Trucking Co. v. United States.* The decision that Petitioner seeks to have reviewed is that of an employee review board of the Commission. That decision, contained in Docket No. MC-113974 (Sub-No. 50G), *Pittsburgh & New England Trucking Co., Extension-Gateway Elimination,* was rendered on October 4, 1976.

JURISDICTION

Intervenors submit that this Court lacks jurisdiction to consider this matter insofar as the United States Court of Appeals for the Third Circuit, whose order Petitioner seeks to have this Court review, determined that it lacked jurisdiction by virtue of Petitioner's failure to exhaust administrative remedies available to it.

QUESTION PRESENTED

Whether this Court has jurisdiction over a question that should have been addressed by the Petitioner to the Interstate Commerce Commission, rather than to a federal court.

STATUTES AND REGULATIONS INVOLVED

This case raises questions as to the proper application of: Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, providing:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . . . Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority;

Section 2342 of the Judiciary Act, 28 U.S.C. § 2342 (1970 & Supp. V), providing:

> The court of appeals has exclusive jurisdication to enjoin, set aside, suspend (in whole or in part) or to determine the validity of –
>
> . . .
>
> (5) all rules, regulations, or final orders of the Interstate Commerce Commission . . . ;

Section 17(10) of the Interstate Commerce Act, 49 U.S.C. § 17(10), providing:

> When an application for rehearing, reargument, or reconsideration of any decision, order or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or by reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or

> requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise;

and, Rule 101(a) (2) of the Interstate Commerce Commission's General Rules of Practice, 49 C.F.R. § 1100.101(a) (2) (1976), providing:

> Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

STATEMENT OF THE CASE

Intervenors will not repeat the statement of the case as set forth by Petitioner, rather limiting their comments to a few matters that require further mention. Otherwise, the statement of Petitioner is adopted although much of it is not considered pertinent to the resolution of this case by this Court.

First, it should be noted that the proceedings before the agency prior to the first petition to the Third Circuit consisted of a summary dismissal of Petitioner's application on an essentially procedural basis: the failure to accompany the application with the evidence required by the pertinent regulation, 49 C.F.R. § 1065. The initial decision in this regard was that of a single Commissioner, in which all late-filed evidence was rejected and the application was dismissed for want of evidence. On petition for reconsideration, a Division of the Commission (composed of three Commissioners), affirmed the dismissal. Thus, it can readily be seen that the Division did not look

at the evidence at all. Therefore, Petitioner's suggestion (later in its petition) that the Commission was already predisposed against it on the merits (thus presumably making a further administrative appeal futile), is unsupported by the facts present here.

Second, it must also be noted that, despite Petitioner's repeated references on page 7 of its petition to orders of "the Commission," the referred-to orders were not those of the Commission, but rather those of its employee Review Board. Petitioner's preemptory action deprived the Commission itself of an opportunity to consider Petitioner's evidence and to correct errors, if any, in the Review Board's decision.

Finally, intervenors must also take exception to Petitioner's use of the term "final order" to describe the Review Board's decision in the case under review. The word "final," in the administrative context, is a word of art. It conjures up the notion of administrative finality, which is jurisdictional under 28 U.S.C. § 2342 (1970 & Supp. V). While the involved order may be the final order in the sense that it is the last order chronologically, for reasons to be described below, it is not a "final" order under the governing statutory provisions.

ARGUMENT IN OPPOSITION TO THE PETITION

I.
THE ORDER IN QUESTION IS NOT A "FINAL" ORDER

In order for a federal court to have jurisdiction to review an order of the Interstate Commerce Commission, 28 U.S.C. § 2342 provides that the order must be a final one. Without such finality, the court's jurisdiction cannot be invoked. Under 5 U.S.C. § 704, agency action is final despite the pendency of a petition seeking reconsidera-

tion of another appeal to a superior agency authority *unless* the agency provides otherwise by rule. Here, the Interstate Commerce Commission has a rule (49 C.F.R. § 1100.101(a)(2)) providing specifically that an employee board decision is *not* administratively final and that the same *shall* be subject to a petition seeking review of the decision by the Commission itself.

Here, Petitioner failed to file a petition for reconsideration. Instead, it sought judicial review. The order which it sought to have reviewed was not final by the specific terms of the Commission's regulations.

II.
PETITIONER FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES

Because it failed to file a petition before the Commission, and therefore sought review of a non-final order, Petitioner's petition for review in the Third Circuit was properly denied. That court correctly determined that it lacked jurisdiction to consider the appeal. For the same reason, the Petition now before this Court must be denied. The doctrine of exhaustion is well-settled and no significant question warranting the attention of this Court has been presented.

Exhaustion as a prerequisite to judicial review is an important doctrine necessary to the preservation of the integrity of the administrative process as well as the notion of judicial deference to agency expertise. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Contrary to Petitioner's suggestion, this case demonstrates precisely why exhaustion is important in the administrative setting. Only by confusing the employee Review Board with the Commission itself can Petitioner reach its conclusion. As this Court said in

McKart v. United States, 395 U.S. 185, 193-95 (1969), the ability of an agency to correct errors made by its employees is an important part of the exhaustion doctrine. *Accord, Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). The Commission did not get this opportunity in this case and thus, even assuming arguendo that Petitioner is correct, it is addressing its complaint to the wrong forum.

Finally, it should be noted that the only exception to the exhaustion doctrine is in those rare cases where irreparable harm would result from a delay in judicial review. Here, Petitioner continued to operate throughout the pendency of the agency proceeding and could have continued to do so while it filed a petition. Since added litigation costs do not constitute irreparable harm, no exception is applicable here. *See Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 23-24 (1974).

CONCLUSION AND PRAYER

WHEREFORE, Intervenors pray that this Court will find no warrant for review of this case; that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied; and for such other and further relief as it deems proper in these premises.

Respectfully submitted,

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